

EX PARTE OR LATE FILED
DOW, LOHNES & ALBERTSON
ATTORNEYS AT LAW
1255 TWENTY-THIRD STREET
WASHINGTON, D. C. 20037

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WERNER K. HARTENBERGER

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March 31, 1994

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MAR 31 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Re: Broadband PCS Pioneer's Preferences
Gen. Docket No. 90-314

Dear Mr. Caton:

On behalf of Cox Enterprises, Inc. ("Cox"), this will respond to the letter of March 16, 1994, submitted in the above-captioned proceeding by Bell Atlantic Personal Communications, Inc., on behalf of the Bell Atlantic Companies ("Bell Atlantic"). In its letter, Bell Atlantic objects to the Commission's February 25, 1994, Public Notice which invited the three companies awarded PCS pioneer's preferences (Cox, American Personal Communications and Omnipoint Communications) to file applications and specified the requirements for such filings.

Bell Atlantic's letter is nothing more than a transparent attempt to thwart the introduction of a new service which would compete with its established telephone monopoly. The letter contains nothing to warrant extraordinary Commission action withdrawing its February Notice.

1. Bell Atlantic Has No Standing

Cox's PCS services will be provided within the Los Angeles-San Diego MTA. Bell Atlantic operates on the other side of the country, in New Jersey, Pennsylvania, West Virginia, Maryland, Virginia, and the District of Columbia and has cellular

1/ Public Notice, "Commission Invites Filing of Broadband Personal Communications Service Pioneer's Preference Application," (released February 25, 1994) ("February Notice"). See Third Report and Order, Gen. Docket No. 90-314, FCC 93-550 (released February 3, 1994) ("Third Report").

operations in these areas and several others, but no cellular presence in southern California. Bell Atlantic has failed to demonstrate how it will directly compete with Cox's PCS service. Accordingly, Bell Atlantic lacks standing to protest the February Notice insofar as it relates to Cox's proposed PCS operations. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

2. The Pendency of Petitions for Reconsideration Does not Preclude Pioneer's Preference Holders' Applications

Ignoring Congress' express direction that the Commission act promptly to facilitate implementation of PCS,^{2/} Bell Atlantic argues that the PCS application process cannot begin until all PCS rules are final and no longer subject to reconsideration. Its various arguments have no basis in either law or policy and only serve to advance Bell Atlantic's dilatory purpose.

Effective Date. Bell Atlantic claims that the pioneer's preference is an exercise of Commission rulemaking authority and that, as such, the PCS preferences will not be effective until March 30, 1994. The Commission need not resolve the question whether PCS pioneer's preferences are rulemaking or adjudicatory decisions here, however,^{3/} because Cox does not intend to file its PCS application until after March 30, 1994, the date on which Bell Atlantic itself concedes that pioneer's preferences will be effective. In any event, the Commission has the authority to accept the applications it has invited.

Need for Processing Rules. Bell Atlantic argues that no PCS applications may be filed unless final PCS processing rules are in place. However, the February Notice specifically dealt with that issue, recognizing that such rules are under

2/ Section 6002(d)(2) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 107 Stat. 379, 396-397 (1993) requires the Commission to commence issuing PCS licenses and permits by May 7, 1994.

3/ It should be noted that Adams Telcom, Inc. v. FCC, 997 F.2d 955 (D.C. Cir. 1993) did not hold that grants of pioneer's preferences (as opposed to the pioneer's preference rules) were necessarily the regulatory equivalent of rules. Rather, the court held that the Commission's order being reviewed failed to give petitioners adequate notice of its adjudicatory characteristics for purposes of establishing the deadline for seeking judicial review. Indeed, in Adams Telcom, Inc., the Commission contended that pioneer's preference decisions were adjudicative and non-rulemaking in nature.

Mr. William F. Caton, Secretary
March 31, 1994
Page 3

consideration in PP Docket No. 93-253, and stating that if the rules adopted therein "...require different fees or application forms than those filed, these applicants may be required to amend the applications accordingly." In other words, the Commission has already addressed and resolved an issue which Bell Atlantic seeks to transform into an insurmountable obstacle to the mere filing of applications.

Finally, and most significantly, the February Notice expressly provides for petitions to deny. The Commission has thus ensured that interested parties^{4/} may raise issues which may be associated with PCS pioneer's preference applications. Bell Atlantic's procedural objections should not be allowed to obfuscate the critical fact that there will be full opportunity for the Commission to consider and resolve substantive public interest issues prior to authorization of PCS service.

Need for Service Rules. Bell Atlantic also argues that the pendency of petitions for reconsideration of the PCS service rules mandates deferral of the application process. It is well established, however, that the pendency of petitions for reconsideration does not automatically stay the effect of a Commission decision; rather, a special order is required.^{5/} To delay the filing of applications merely because of the possibility that the PCS rules might be reconsidered to some degree would be to assume the validity of the reconsideration petitions' claims. The proper course is the course the Commission has adopted: to invite the filing of applications, on condition that they be modified as necessary to reflect the results of reconsideration.^{6/}

In fact, were the Commission to take the approach suggested by Bell Atlantic, no new services would ever move forward from proposal to license to public service offering. Any entrenched competitor could bog down the process indefinitely by filing an endless series of reconsideration petitions. The

4/ As noted above, however, Bell Atlantic has failed to demonstrate that it has standing to petition to deny Cox's PCS application.

5/ 47 C.F.R. § 1.106(n); see, e.g., Blue Ridge Cable Television, Inc., 57 FCC 2d 1006 (1976); Houston Mobilfone, Inc., 33 RR 2d 1015 (1975).

6/ See Third Report at ¶ 2 ("Should either PCS channel blocks or service areas be amended on reconsideration, the pioneer's preferences will be modified accordingly.")

Mr. William F. Caton, Secretary
March 31, 1994
Page 4

Commission should reject Bell Atlantic's transparent attempt to derail PCS licensing.

3. The Paper Reduction Act of 1980 Does Not Bar the Filing of PCS Pioneer's Preference Applications

To buttress its anticompetitive attempt to delay the institution of PCS operations, ^{1/}Bell Atlantic urges that the Paperwork Reduction Act of 1980 bars PCS pioneer's preference applications. Bell Atlantic's contentions misread both the PRA's plain language and its purpose.

The PRA establishes certain requirements governing the "collection of information" by federal agencies. Section 3502(4) defines "collection of information" as

...the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either

- (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
- (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.^{8/}

Here, only three entities (none of which are governmental agencies) have been invited to file applications. Because the FCC's "collection of information" applies only to three persons, seven less than the PRA's jurisdictional floor, the PRA does not apply.

^{1/} 44 U.S.C. §§ 3500, et seq. ("PRA").

^{8/} 44 U.S.C. § 3502(4) (emphasis supplied). The statutory definition is confirmed in the PRA's implementing regulations, which define "collection of information" as "...the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements...". 5 C.F.R. § 1320.7(c).

Mr. William F. Caton, Secretary
March 31, 1994
Page 5

In any event, the forms which the PCS pioneer's preference holders will use in submitting their applications (FCC Forms 155 and 401) have been approved by OMB^{9/} so that, even if the PRA did apply, the requisite OMB approval is present.

The PRA is not intended as a means of thwarting agency operations; rather, it is designed to protect entities which are subject to agency jurisdiction. As the regulations state, the PRA "...is designed to minimize and control burdens associated with the collection of information by Federal Agencies..." 5 C.F.R. § 1320.1. This protective purpose is evident in the requirement that persons may not be penalized for failure to comply with collections of information which have not been approved by the Office of Management and Budget. 5 C.F.R. § 1320.5(a). The regulations do not, as Bell Atlantic implies, prohibit voluntary compliance with non-OMB approved collections of information.

In sum, the PRA does not by its terms apply to the three PCS applications invited by the February Notice. Nor does the PRA's stated purpose apply in these circumstances. Bell Atlantic's attempt to transform PRA's protective provisions into barriers to PCS application processing must therefore fail.

4. The PCS Pioneer's Preference Applications are not Premature and Prejudicial

Finally, Bell Atlantic argues that processing and acceptance of PCS pioneer's preference applications will prejudice other PCS operators and, in effect, grant the preference holders a "temporary service monopoly." Such complaints about an alleged monopoly ring particularly hollow when made by Bell Atlantic which itself has long enjoyed not merely a temporary but an enduring local telephone service monopoly, not to mention the monopoly benefits of its cellular wireline set-aside.^{10/}

9/ Additional information which the Commission may request from individual PCS pioneer's preference applicants would not be subject to OMB approval because "information" for PRA purposes excludes "a request for facts or opinions addressed to a single person" and "facts or opinions obtained or solicited through nonstandardized follow-up questions designed to clarify responses to approved collections of information." 5 C.F.R. §§ 1320.7(j)(6) and 1320.7(j)(9).

10/ Bell Atlantic's claim is particularly outrageous considering its position before the Commission and the Department
(continued...)

Not only are Bell Atlantic's claims hollow, however; they are misplaced. The Commission already has fully addressed and resolved them. Bell Atlantic admits that, in adopting pioneer's preferences, the Commission expressly acknowledged that pioneer's preference holders could enjoy a "...de facto headstart that may occur due to the time it may take other entities to apply for and receive a license."^{11/} Thus any de facto headstart for pioneers was determined by the Commission to be acceptable public policy and Bell Atlantic submits absolutely nothing to suggest the contrary.^{12/}

Finally, it is nonsense for Bell Atlantic to claim that allowing preference holders to begin implementing their proposals will hamper the Commission in modifying PCS rules if necessary to serve the public interest. The Commission repeatedly has indicated that PCS pioneer's preference applications and authorizations would be subject to modification if required by subsequent rule changes.^{13/}

Bell Atlantic's concerns about the possible advantages flowing from the February Notice's filing invitation are private concerns which have no place in Commission regulatory decisions. The Commission has determined that the public interest would be

^{10/} (...continued)
of Justice that PCS will provide competition to cellular, thereby justifying relief from equal access and other restrictions placed on Bell Atlantic and other Bell Operating Company affiliates under the terms of the Modified Final Judgment.

^{11/} Report and Order, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Report"), recon., 7 FCC Rcd 1808 (1992), further recon. denied, 8 FCC Rcd 1659 (1993); see also, Notice of Proposed Rule Making, Review of the Pioneer's Preference Rules, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993); First Report and Order, Review of the Pioneer's Preference Rules, 9 FCC Rcd 605 (1994).

^{12/} Bell Atlantic's claim that this represents a change in regulatory policy is thus in error. Moreover, Bell Atlantic's acceptance of its wireline cellular set-aside and headstart over its non-wireline competitors plainly are inconsistent with its position vis-a-vis PCS preference licenses.

^{13/} See February Notice and Third Report, supra, at par. 2.

Mr. William F. Caton, Secretary
March 31, 1994
Page 7

served by granting pioneer's preference to Cox and two others.^{14/} The Commission's solicitation of PCS pioneer's preference applications does no more than further the clear public interest in prompt implementation of the innovative services developed by the preference holders. The February Notice is the wrong forum for Bell Atlantic to reargue the general merits of the pioneer's preference concept or the particular merits of the three PCS pioneer's preference proposals.

5. Conclusion

Congress repeatedly has emphasized its strong interest in the development and implementation of new technologies in general^{15/} and PCS in particular.^{16/} Recognizing that PCS poses a threat to its longstanding monopoly, Bell Atlantic is now apparently grasping for any available means to thwart the implementation of a competing service. The contrived arguments of its March 16, 1994, letter afford no basis for delaying the public benefits of the new technology embodied in the PCS pioneer's preference proposals.

The Commission has broad authority to adopt procedures which it determines will serve the public interest.^{17/} The February Notice represents a reasonable exercise of the Commission's administrative discretion. Bell Atlantic submits

14/ See Pioneer's Preference Report, 6 FCC Rcd at 3490 ("A new service or rule will not be granted unless we find that the overall public interest is served, and not just the special interest of an innovator or those who would be served by the innovator's proposal.")

15/ See, e.g., 47 U.S.C. § 157.

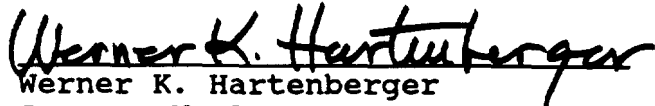
16/ See n. 2, supra.

17/ It is well established that administrative agencies are masters of their own houses and are free to fashion procedures which are optimally conducive to implementing their statutory mandates. See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies, 111 S. Ct. 615 (1991); FCC v. Schreiber, 381 U.S. 279 (1965); Amcor, Inc. v. Brock, 780 F.2d 897 (11th Cir. 1986); Katzson Bros., Inc. v. United States, 839 F.2d 1396 (10th Cir. 1988); Frazier v. Merit System Protection Board, 672 F.2d 150 (D.C. Cir. 1982); Seacoast Anti-Pollution League v. Costle, 597 F.2d 306 (1st Cir. 1979); Natural Resources Defense Council v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

Mr. William F. Caton, Secretary
March 31, 1994
Page 8

nothing to warrant the February Notice's rescission or
modification. Its request for such action must be denied.

Respectfully submitted,


Werner K. Hartenberger
Suzanne M. Perry
Laura H. Phillips

Counsel for COX ENTERPRISES, INC.

cc: Parties Listed on the Attached Service List

CERTIFICATE OF SERVICE

I, Pamela Marie DuBost, hereby certify that today on this 31st day of March, 1994, I caused copies of the foregoing letter to be served by first-class mail, postage prepaid to the following:

Stuart F. Feldstein
Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, DC 20036
Counsel for Adelphia
Communications and Omnipoint
Mobile Data Company

Robert J. Miller
Gardere & Winne
1601 Elm Street, Suite 3000
Dallas, TX 75021
Counsel for Alcatel Network Systems

Gene A. Bechtel
Bechtel & Cole, Chartered
Suite 250
1901 L Street, N.W.
Washington, DC 20036
Counsel for Advanced Cordless
Technologies

David L. Nace
Lukas, McGowan, Nace
& Gutierrez, Chartered
1819 H Street, NW
Seventh Floor
Washington, DC 20006
Counsel for Alliance of Rural Area
Telephone and Cellular Service
Providers, and Pacific Telecom
Cellular, Inc.

Robert B. Kelly
Kelly, Hunter, Mow & Povich
1133 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Advanced Mobilcom &
Digital Spread Spectrum
Technologies

Diane Smith
Alltel Service Corp.
1710 Rhode Island Avenue, N.W.
Suite 1000
Washington, DC 20036

Ellen S. Deutsch
Thelen, Marrin, Johnson & Bridges
2 Embarcadero Center
San Francisco, CA 94111
Counsel for Advanced Wireless
Communications, Inc.

Jeffrey L. Clarke
American Gas Association
1515 Wilson Boulevard
Arlington, VA 22209

Glen S. Richards
Fisher, Wayland, Cooper &
Leader
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20006
Counsel for American Mobile
Satellite Corporation

Association of American Railroads
50 F Street, N.W.
Washington, DC 20001

Alan R. Shark
American Mobile Telephone
Association
1835 K Street, N.W., Suite 203
Washington, DC 20006

Russell H. Fox
American SMR Network Association
1835 K St., N.W., Suite 203
Washington, D.C. 20006

Kurt A. Wimmer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044
Counsel for American Personal
Communications

American Telezone Intercell
International Inc.
13103 N. Moss Creek Dr.
Cypress, TX 77429

Wayne V. Black
Keller & Heckman
1001 G Street, N.W., Suite 500 W
Washington, DC 20001
Counsel for American Petroleum
Institute and Special Industrial
Radio Service Association

Robert N. Reiland
Ameritech
30 South Wacker Drive
Suite 3900
Chicago, IL 60606

George Y. Wheeler
Koteen & Naftalin
1150 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
Counsel for American Portable
Telecommunications, Inc. and
Telephone Data Systems

Frank Michael Panek
Ameritech
2000 West Ameritech Center Dr.
Hoffman Estates, Illinois 60196

Lon C. Levin
AMSC Subsidiary Corporation
10802 Park Ridge Blvd.
Reston, VA 22091

John D. Lane
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W.
Washington, DC 20006
Counsel for APSCO

Robert L. Vasquez
Anchorage Telephone Utility
600 Telephone Avenue
Anchorage, AK 99503

Shannon Fitzsimmons
APSCO-Arizona
755 West Grant Road
Tucson, AZ 85703

James Gunn
Andrew Corporation
1850 North Greenville
Suite 100
Richardson, TX 75081

C. E. Baker
Arch Communications Group, Inc.
1800 West Park Drive, Suite 250
Westborough, MA 01581

James F. Lovette
Apple Computer Inc.
One Infinite Loop, MS:301-4J
Cupertino, CA 95014

Walter H. Sonnenfeldt
Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, MD 20852
Counsel for Arraycomm, Inc.

Applied Telecommunications
Technologies, Inc.
20 William Street
Wellesley, Massachusetts 02181

Robert E. Tall
Associated Public-Safety
Communications
Officers
P.O. Box 669
New Smyrna Beach, FL 32170

Robert J. Keller
Fleischman and Walsh
1400 16th Street, N.W.
Washington, DC 20036
Counsel for Associated PCN Co.

James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004
Counsel for Bell Atlantic

David E. Weisman
Alan S. Tillas
Meyer, Faller, Weisman and
Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, DC 20015
Counsel for Association for Private
Carrier Paging and NABER

Michael S. Slomin
Bell Communications Research, Inc.
290 W. Mt. Pleasant Avenue
Livingston, NJ 07039

Francine J. Barry
AT&T
295 North Maple Avenue
Basking Ridge, NJ 07920

L. Andrew Tollin
Michael Deuel Sullivan
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, NW
Washington, DC 20006-5289
Counsel for BellSouth

Gerald S. McGowan
Lukas, McGowan, Nace
& Gutierrez, Chartered
1819 H Street, NW
Seventh Floor
Washington, DC 20006
Counsel for Atlantic Cellular
Company and Dial Page

William B. Barfield
BellSouth Corporation
1155 Peachtree Street, N.W.
Atlanta, GA 30367-6000

Daniel L. Bart
1850 M Street, NW
Suite 1200
Washington, DC 20036

Riley M. Murphy
Wirpel & Murphy
1100 Poydras Street, Suite 2950
New Orleans, LA 70163
Counsel for Berlin

Christopher D. Imlay
Booth, Freret & Imlay
1920 N Street, NW
Suite 150
Washington, DC 20036

Lynn Diebold
California Public Safety Road
Association, Inc.
4016 Rosewood Avenue
Los Angeles, CA 90004

Dennis F. Begley
Reedy, Begley & Martin
2033 M Street, NW
Washington, DC 20036
Counsel for Broadband
Communications Corporation

David B. Leeson
California Microwave
985 Almanor
Sunnyvale, CA 94806

James F. Ireland
Cole, Raywid & Braverman
1919 Pennsylvania Avenue
Second Floor
Washington, DC 20006-3458
Counsel for Cable USA, Inc.

Ellen S. Levine
California Public Utilities
Commission
505 Van Ness Avenue
San Francisco, CA 94102

Charles D. Ferris
Mintz, Levin, Cohn, Ferris
Glovsky & Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
Counsel for Cablevision Systems

Kenneth J. Brown
Capital Cities/ABC, Inc.
77 West 66th Street
New York, NY 10023

Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, DC 20005
Counsel for Calcell Wireless, Inc.

Thomas J. Casey
Skadden, Arps, Slate, Meagher &
Flom
1440 New York Avenue, N.W.
Washington, DC 20005
Counsel for CCI

F. G. Harrison
Cellnet
Hanover House
49-60 Borough Road
London SE1 1DS
ENGLAND

James S. Quarforth
CFW Telephone Company
401 Spring Lane, Suite 300
P.O. Box 1990
Waynesboro, VA 22980

Nancy J. Thompson
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, DC 20036
Counsel for Cellular Service, Inc.

Chesnee Telephone Company
Pansy M. Askins
P.O. Box 430
Chesnee, SC 29323

Simone Wu
Skadden, Arps, Slate, Meagher &
Flom
1440 New York Avenue, N.W.
Washington, DC 20005
Counsel for CELSAT, Inc.

Robert E. Sigmon
Cincinnati Bell Telephone
201 E. Fourth Street, 102-320
P.O. Box 2301
Cincinnati, OH 45201

Charles F. Wright
Centrel Corporation
8725 Higgins Road
Chicago, IL 60631

Ellen S. Deutsch
Citizens Utilities Co.
P.O. Box 496020
1035 Placer Street
Redding, CA 96049-6020

Harold Mordkofsky
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W., Suite 300
Washington, DC 20037
Counsel for Century Cellunet, Inc.

W. Randolph Young
City Utilities of Springfield
1050 17th Street, N.W., Suite 1200
Washington, DC 20036

Andrew D. Lipman
Swidler & Berlin
3000 K Street, N.W.
Washington, DC 20007
Counsel for Clear Creek, et al., Local
Area Telecommunications Inc. and
PCNSNY

Cheryl Lynn Schneider
Communications Satellite Corp.
950 L'Enfant Plaza, S.W.
Washington, DC 20024

David Lemon
CNET
4975 Preston Park Blvd., 8th Floor
Plano, TX 75093

Nancy J. Thompson
COMSAT Mobile Communications
22300 COMSAT Drive
Clarksburg, MD 20871

William J. Cole
Cobra Electronics Group of
Dynascan Corporation
6500 West Cortland Street
Chicago, IL 60635

H. Mark Gibson
Comsearch
11720 Sunrise Valley Drive
Reston, VA 22091

David A. LaFuria
Lukas, McGowan, Nace
& Gutierrez, Chartered
1819 H Street, NW
Seventh Floor
Washington, DC 20006
Counsel for Columbia Cellular
Corporation

Barry R. Rubens
The Concord Telephone Company
68 Cabarrus Avenue East
P.O. Box 227
Concord, NC 28026

Dr. Robert L. Riemer
Committee on Radio Frequencies
National Research Council
2101 Constitution Avenue
Washington, DC 20418

William J. Sill
McFadden, Evans & Sill
1220 19th Street, NW
Suite 501
Washington, DC 20036
Counsel for Contel Cellular, Inc.

Ted V. Lennick
Cooperative Power
14615 Lone Creek Road
Eden Prairie, MN 55344-2287

Raymond G. Bender, Jr.
Dow, Lohnes & Albertson
1255 23rd St., N.W., Suite 500
Washington, D.C. 20037
Counsel for DBX Corp.

John D. Lockton
Corporate Technology Partners
100 S. Ellsworth Avenue
9th Floor
San Mateo, CA 94401

Paul R. Schwedler
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204

Thomas K. Crowe
Hopkins & Sutter
888 16th Street, N.W.
Washington, DC 20006

David A. Hendon
Department of Trade and Industry
Kingsgate House
66-74 Victoria Street
London SW1E 68W
ENGLAND

Philip L. Verveer
Willke Farr & Gallagher
1155 21st Street, N.W., Suite 600
Washington, DC 20036-3384
Counsel for CTIA

Leonard Robert Raish
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036
Counsel for Digital Microwave Corp

Jimmy K. Omura
Cylink Corporation
110 South Wolfe Road
Sunnyvale, CA 94086

W. Theodore Pierson, Jr.
Pierson & Tuttle
Suite 607
1200 19th Street, NW
Washington, DC 20036
Counsel for Digital Satellite
Broadcasting Corporation

Howard C. Davenport
Public Service Commission of
The District of Columbia
450 Fifth Street, NW
Washington, DC 20001

Fred I. Denny
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Shirley S. Fujimoto
Keller & Heckman
1001 G Street, N.W., Suite 500 West
Washington, DC 20001
Counsel for Domestic Automation

Dinah D. McElfresh
EEPA
1255 23rd Street, N.W., Suite 850
Washington, DC 20037-1174

Harold K. McCombs, Jr.
Duncan, Weinberg, Miller &
Pembroke, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036

David C. Jatlow
Young & Jatlow
2300 N Street, N.W., Suite 600
Washington, DC 20037
Counsel for Ericsson

James A. Dwyer, Jr.
2100 Electronics Lane
Fort Myers, FL 33912

Paul J. Sinderbrand
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse Suite
Washington, DC 20005
Counsel for Express Communications

Thomas J. Casey
Skadden, Arps, Slate, Meagher &
Flom
1440 New York Avenue, N.W.
Washington, DC 20005
Counsel for Echo Group L.P.

William Kennard
General Counsel
Office of the General Counsel
Federal Communications
Commission
1919 M Street, NW, Room 614
Washington, DC 20554

Christopher J. Wright
Deputy General Counsel
Federal Communications
Commission
1919 M Street, NW, Room 614
Washington, DC 20554

David L. Hill
O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006
Counsel for Florida RSA Partners

C. J. Cant
Ferranti CreditPhone Ltd.
9 High Street
Fareham
Hampshire PO167AN
ENGLAND

Harold Mordkofsky
Freeman Engineering
Blooston, Mordkofsky, Jackson &
Dickens
2120 L Street, N.W., Suite 300
Washington, DC 20037
Counsel for Freeman Engineering
Associates, Inc.

Scott J. Loftesness
Fidelity Investments
82 Devonshire Street
Boston, MA 02019

James E. Taylor
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Bruce D. Jacobs
Fisher, Wayland, Cooper &
Leader
2001 Pennsylvania Avenue, N.W.,
Suite 400
Washington, DC 20006

Laura C. Mow
Gardner, Carton & Douglas
1001 Pennsylvania Ave., NW
Washington, DC 20004

Audrey P. Rasmussen
O'Connor & Hannan
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-3483
Counsel for Florida Cellular RSA
Limited Partnership

Henry Geller
1750 K Street, N.W.
Suite 800
Washington, DC 20006

Kathy L. Shobert
General Communication, Inc.
Director, Federal Regulatory Affairs
888 16th Street, NW
Suite 600
Washington, DC 20006

David A. Reams
Grand Broadcasting Corporation
27109 Shawnee
Perrysburg, OH 43551

Quincy Rodgers
General Instrument Corporation
1155 21st Street, NW
4th Floor
Washington, DC 20036

Edward P. Taptich
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, DC 20005
Counsel for Graphic Scanning
Corporation

James G. Ennis
Fletcher, Heald and Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036
Counsel for Geostar Messaging
Corporation

Glenn S. Richards
Gruman, Kurtis, Blask &
Freedman, Chartered
1400 Sixteenth Street, NW
Suite 500
Washington, DC 20036

Lawrence M. Miller
Schwartz, Woods & Miller
The Dupont Circle Building
1350 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Global Enhanced
Messaging

Gail L. Polivy
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20036

Leonard Robert Raish
Global-Wolfsberg Systems, Inc.
1225 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

George Petrutsas
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036
Counsel for Harris Corporation,
Matsushita Communication, Ohio
Linx and Roseville Telephone

Robert M. Jackson
Blooston, Mordkofsky, Jackson
and Dickens
2120 L Street, N.W.
Washington, DC 20037
Counsel for Harrisonville, Kerrville
Telephone and Rural Cellular
Corp.

F. Thomas Tuttle
Hughes
Sumner Square, Suite 700
1615 M Street, N.W.
Washington, DC 20036

Daniel L. Hart
1850 M St., N.W., Suite 1200
Washington, D.C. 20036

Stephan P. Carrier
Hughes Network Systems, Inc.
11717 Exploration Lane
Germantown, MD 20874

Brice L. Clark
Hewlett-Packard Company
8000 Foothills Blvd.
Roseville, CA 95678

Donald C. Loughry
IEEE
Hewlett-Packard Company
19420 Homestead Road, M/S 43UC
Cupertino, CA 95014

Michael W. Medin
Hitachi Telecom (USA)
2990 Gateway Drive
Norcross, GA 30071

Darrell S. Townsley
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, IL 60601

M. John Bowen
McNair Law Firm
1155 Fifteenth Street, N.W.
Washington, DC 20005
Counsel for Home Tel, Piedmont, et
al., Rock Hill, et al., and Pametto
Rural Telephone Coop

Rodney L. Joyce
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for In-Flight

Donald L. Schilling
Interdigital Communications Corp.
85 Old Shore Road, Suite 200
Port Washington, NY 11050

Chandos A. Rypinski
LACE Inc.
655 Redwood Highway #340
Mill Valley, CA 94941

James U. Troup
Arter & Hadden
1801 K Street, NW
Washington, DC 20006
Counsel for Iowa Network Services,
Inc.

John H. Fischer
LCC Incorporated
2300 Clarendon Boulevard
Suite 800
Arlington, VA 22201

Michael Killen
Killen & Associates, Inc.
382 Fulton Street
Palo Alto, CA 94301

Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817

Kevin Compton
Kleiner Perkins Caufield & Byers
2750 Sand Hill Road
Menlo Park, CA 94025

Paul R. Rodriguez
Leventhal, Senter & Lerman
2000 K Street, NW
Suite 600
Washington, DC 20006

Lourens Van Der Jagt
Knowlege Implementations
32 Conklin Road
Warwick, NY 10990

Robert A. Mazer
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, N.W., Suite 800
Washington, DC 20005
Counsel for Lincoln Telephone

Victor J. Toth
Law Offices of Victor J. Toth
2719 Soapstone Drive
Reston, VA 22091
Counsel for Linkatel
Communications Inc.

Larry A. Blosser
MCI Telecommunications
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

John E. Hoover
Jones, Day, Reaves & Pogue
Metropolitan Square
1450 G Street, NW
Washington, DC 20005
Counsel for Litel
Telecommunications Corp.

John C. Carrington
Mercury Personal Communications
Network, Ltd.
1 Harbour Exchange Square
London, E14 9GE
ENGLAND

Irvin G. Stiglitz
Massachusetts Institute of
Technology
Lincoln Laboratory
244 Wood Street
Lexington, MA 02173-9108

Larry S. Solomon
Ginsburg, Feldman & Bress,
Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036
Counsel for Metricom, Inc.

Raymond J. Kimball
Ross & Hardies
888 16th Street, NW
Suite 300
Washington, DC 20006
Counsel for Matrix Personal
Communications

Lawrence J. Movshin
Thelen, Marrin, Johnson &
Bridges
805 15th Street, N.W.
Washington, DC 20005-2207
Counsel for Metriplex and Small
Business PCS Association

Mark R. Hamilton
Scott K. Morris
McCaw Cellular Communications,
Inc.
5400 Carillon Point
Kirkland, WA 98033

Marilyn M. Moore
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

G. Todd Hardy
Millicom, Incorporated
153 East 53rd Street
Suite 5500
New York, NY 10022

Richard E. Wiley
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006
Counsel for MTEL

Tak Imamura
Mitsubishi Electric Corporation
1-1, Tsukaguchi - Honmachi
8-Chome
Amagasaki City, Hyogo 661
JAPAN

Carl W. Northrop
Bryan Cave
Suite 700
700 13th Street, NW
Washington, DC 20005
Counsel for Murray, George

Michael B. Gordon
Montgomery Securities
600 Montgomery Street
San Francisco, CA 94111

Robert J. MillerGardere & Wynne
1601 Elm Street, Suite 3000
Dallas, TX 75210
Counsel for NAC, Inc.

Michael D. Kennedy
Motorola, Inc.
1350 I Street, N.W., Suite 400
Washington, DC 20005

Paul Rodgers
NARUC
1102 ICC Building
P.O. Box 684
Washington, DC 20044

Philip L. Malet
Septoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for Motorola Satellite
Communications

Albert H. Kramer
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Penthouse Suite
Washington, DC 20005
Counsel for NATA

Charles T. Force
National Aeronautics and Space
Administration
Washington, DC 20546

Lawrence R. Krevor
Nextel Communications, Inc.
601 13th Street, N.W.
Suite 1110 South
Washington, DC 20005

Henry L. Baumann
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Veronica M. Ahern
Nixon, Hargrave, Devans & Doyle
One Thomas Circle
Suite 800
Washington, DC 20005

Paul R. Schwedler
National Communications System
Telecommunications (DOD)
Code AR
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204

Albert Halprin
Halprin, Mendelsohn & Goodman
1301 K Street, N.W.
Washington, DC 20005
Counsel for Northern Telecom

William H. Talmage
NCR Corporation
1700 S. Patterson Blvd.
Dayton, OH 45479

Dennis L. Hill
Northwest Iowa Power Cooperative
P.O. Box 240
Le Mars, Iowa 51031

Penny Rubin
New York State Department of
Public Service
Three Empire State Plaza
Albany, NY 12223

Roland Williams
Novatel Communications, Ltd.
1020 - 64 Avenue, NE
Calgary, Alberta
CANADA T2E 7V8

David Cosson
NTCA
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Stephen L. Goodman
Verner, Lipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, DC 20005
Counsel for Orbital Communications
Corporation

Mirijana Kocho
Nynex Corporation
120 Bloomingdale Road
White Plains, NY 10605

Michael K. Kellogg
Kellogg, Huber & Hansen
1301 K Street, N.W.
Suite 305 East
Washington, DC 20005
Counsel for Pacific Bell

Mark Tauber
Piper & Marbury
1200 19th Street, N.W.
Washington, DC 20036
Counsel for Omnipoint Corporation

Michael Lubin
Pacific Communications Sciences
10075 Barnes Canyon Road
San Diego, CA 92121

Lisa M. Zaina
OPASTCO
21 Dupont Circle, N.W.
Suite 700
Washington, DC 20036

Pamela J. Riley
Pactel Corporation
2999 Oak Road, M.S. 1050
Walnut Creek, CA 94596

Richard Brass
Oracle Data Publishing, Inc.
500 108th Avenue, N.E.
Suite 1750
Bellevue, WA 98004-5500

Mark A. Stachiw
Pactel Paging
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251